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425-762—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1608

AUGUSTINE LUNA AND GUNERSINDA LUNA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on March 23, 1971. The petition for a writ of certiorari was filed on April 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the instructions on Counts One and Four, each charging the receipt and concealment of unlawfully imported heroin, improperly permitted the jury to base a conviction on those counts on a finding

that petitioners committed offenses not charged therein.

2. Whether it was prejudicial error for the court, which had properly charged that a conviction on the two substantive counts required the jury to find that petitioners knew the heroin had been imported unlawfully, to fail to repeat that instruction in connection with the separate count charging a conspiracy to commit those substantive offenses.

3. Whether the court unfairly implied in its instructions to the jury that only the government witnesses had told the truth.

4. Whether the jury could properly conclude from petitioner Augustine Luna's contradicted testimony, denying that he had carried a revolver, that he did not, in fact, have a license to carry a revolver.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on five counts of a six-count indictment charging narcotics offenses (all involving heroin) (C. Tr. 1; Tr. 490).[1] Counts One through Three charged that petitioners, on November 6, 1969, received and concealed a quantity of the narcotic with knowledge that it had been unlawfully imported (Count One), dispensed and distributed the same heroin otherwise than in or from an original stamp-

[1] "C. Tr." refers to the clerk's transcript. "Tr." refers to the trial transcript, in three consecutively paginated volumes. Both transcripts are on file with the Clerk of this Court.

bearing package (Count Two), and transferred it without a written order of the transferee on an officially issued order form (Count Three), in violation of 21 U.S.C. 174, 26 U.S.C. 4704(a), and 26 U.S.C. 4705(a), respectively. Count Four charged that, on November 7, 1969, they received and concealed an additional and larger quantity of the drug, in violation of 21 U.S.C. 174. Count Six charged in substance that petitioners conspired to commit the above substantive offenses, in violation of 18 U.S.C. 371. Petitioner Augustine Luna was, in addition, convicted on the remaining Count Five charging him with unlawfully carrying a firearm during the commission of a felony prosecutable in a court of the United States, in violation of 18 U.S.C. (Supp. V) 924(c)(2) (C. Tr. 1; Tr. 490). On October 30, 1970, Augustine Luna was sentenced to 15 years' imprisonment on each of Counts One, Three, and Four, ten years on Count Two, one year on Count Five, and five years on Count Six, the sentences on Counts One, Two, Three, Four, and Six to run concurrently with one another but consecutively to that on Count Five, for a total of 16 years; and to pay a $5,000 fine on Count Four (C. Tr. 3). Gunersinda Luna was sentenced to twelve years on Counts One, Three, and Four, ten years on Count Two, and five years on Count Six, all to run concurrently, and to pay a $2,500 fine on Count Four (C. Tr. 4). The court of appeals affirmed (Pet. App. A).

Shortly after 7:00 p.m. on November 6, 1969, Agent Carlos Rivera of the Bureau of Narcotics and Dangerous Drugs was introduced to petitioner Augustine

Luna in Luna's basement apartment on Second Street, in Brooklyn, New York; Augustine was told Agent Rivera was a dealer in narcotics who could be trusted (Tr. 47–48, 96–97, 103).[2] Augustine told the agent that he had a kilogram of cocaine for sale. When the agent expressed interest in buying it, Augustine told his wife, petitioner Gunersinda Luna, who was present, to go and get an eighth of a kilogram of the narcotic. Gunersinda left the apartment, walked a short distance along Second Street within the view of two other agents maintaining surveillance of the area from an alleyway, and then passed beyond their range of vision; she returned five minutes later with a quantity of cocaine wrapped in tinfoil (Tr. 47–50, 140–141, 256–257).

Augustine gave the cocaine to Agent Rivera to examine and said the price would be $13,000 (Tr. 49–50). He told the agent that he also had a quarter of a kilogram of heroin for sale, for $6,500. The agent then offered to purchase both drugs at the same time, but at reduced prices of $12,000 for the cocaine and $6,000 for the heroin; this was accepted, but after making a phone call, Augustine said that the heroin was not yet ready and told the agent to call him later that evening (Tr. 50–51). As Agent Rivera was about to leave, Augustine asked him if he would like a sample of the heroin. The agent said he would and Augustine instructed his wife to go and get some. Gunersinda ascended an outside stairway to the second

[2] The agent was introduced by a confidential informant of the Bureau who had previously supplied the Bureau with samples of heroin and cocaine which he said he had received from Luna at this apartment (Tr. 169–173).

floor of the premises and returned a few minutes later with a small quantity of heroin wrapped in tinfoil. The agent took the sample and left (Tr. 51–66, 238, 242–243). At 10:30 p.m., the agent telephoned Augustine and, upon being told that the heroin was ready, said he would get it and the cocaine the next day (Tr. 67–69).

At 3:30 p.m. the next day, November 7, 1969, Agent Rivera drove to the Luna apartment with another agent, Vincent Guadagnino (Tr. 69–72). While Guadagnino remained in the automobile, Rivera entered the apartment. The agent told Augustine that he had left the $18,000 purchase money with his "partner" outside because he did not wish to bring that much money into the apartment until he had seen the narcotics (Tr. 72). At her husband's request, Gunersinda then left the apartment; agents watching nearby observed her enter the premises next door and emerge a few minutes later carrying a shopping bag, in which were two packages. One of the packages contained 189 grams of a heroin-containing mixture (Tr. 72–73, 147–148, 245–248, 262–263).

Gunersinda showed the packages to Agent Rivera, saying that one contained cocaine, the other heroin. The agent examined the contents of the packages, said he was satisfied and would get the money, and left the apartment (Tr. 73, 77). Agent Rivera then informed Agent Guadagnino that he had seen the narcotics; he was given a package containing the purported purchase money, and entered the apartment. Agent Guadagnino, who tried also to enter, was not

admitted, however. When Agent Rivera observed that Augustine was about to lock an iron gate that separated a hallway of the premises from the street, he identified himself and placed Augustine under arrest (Tr. 77–78). Agent Guadagnino, with five or six other agents who had been in the vicinity, thereupon entered the premises to assist Agent Rivera (Tr. 78, 149, 263–264). A fully loaded .22-caliber revolver was removed from Augustine's belt (Tr. 79, 155, 264–265). After Gunersinda Luna, who resisted arrest, had been subdued, her mother, who had also been in the apartment, slapped her face, saying "Damn money, no good money. I told you not to get into this business" (Tr. 266, 363, 366–367, 387–388).

At trial, petitioners, testifying in their own behalf, denied that they had ever had anything to do with any narcotics transaction (Tr. 324–325, 327, 329–330, 354–355); they contradicted the agents' testimony in practically every material detail.[3] Augustine denied, among other things, that he had ever possessed or seen

[3] For example, both petitioners denied being at home the evening of November 6 (Tr. 321, 326, 333, 345, 351, 352). Gunersinda denied visiting the premises next door on November 7 (Tr. 325, 343–344). Augustine testified that immediately prior to the arrests he had been "upstairs" in the apartment getting ready to go to work (Tr. 353–354, 357–358). Gunersinda testified that just prior to the arrests she had been standing in front of the apartment talking to a man who had arrived shortly before by automobile; that the man suddenly went back to the car and grabbed a package from another man who had come with him; and that the pair then came at her "with a gun" and pushed her into her house (Tr. 323–324, 328–329). Both denied that Gunersinda's mother was in the apartment when the arrests occurred (Tr. 344, 358).

the revolver which three agents testified was removed from his person when he was arrested (Tr. 355); Gunersinda similarly attested that her husband had had no gun (Tr. 330).

ARGUMENT

1. Counts One and Four charged that petitioners had "received and concealed" a quantity of heroin. The statute on which the counts were based, 21 U.S.C. 174, prohibits, in addition to receiving and concealing, "facilitat[ing] the transportation [or] concealment" of heroin. In instructing the jury as to the elements of the offenses charged in these counts, the trial court stated that the first element was "the act or acts of receiving or concealing or facilitating the concealment or transportation of" the heroin (Tr. 465; Pet. 11–12). Petitioners contend that by including in the instruction the reference to "facilitating" concealment or transportation, the court permitted the jury to convict on these counts on the basis of findings that petitioners committed offenses not charged (Pet. 10–15). No objection to this portion of the instruction was made at the trial, however, and its assignment here as error is consequently foreclosed. Fd. R. Crim. P. 30. The contention in any case has no merit.

On this record the jury could not have found that petitioners "facilitated" concealment or transportation of the heroin without also finding that they received and concealed it. Every act involving the heroin that was testified to at the trial was committed solely by petitioners, in concert. This, then, is not a case where the accused, charged with receipt and concealment,

allegedly acted through others, and thus never actually possessed the narcotic himself. Here, even if it could reasonably be argued that the jury possibly convicted petitioners on a "facilitation" theory—a point we dispute—plainly it could not have reached that conclusion on this record without first finding petitioners guilty of the specific crimes charged. There is thus no basis for a claim of prejudice.[4]

2. Petitioners contend that the court erred in failing to instruct the jury that to convict them on the conspiracy count it was necessary to find that petitioners knew the heroin had been unlawfully imported (Pet. 15–20). This claimed error likewise went unchallenged at the trial and the contention, consequently, is similarly precluded. In any event the contention is insubstantial.

Since the offenses petitioners allegedly conspired to commit included that prohibited by 21 U.S.C. 174—*i.e.*, receipt and concealment of narcotics known to have been unlawfully imported—petitioners contend that knowledge that the heroin had been unlawfully imported was also required to be proved under the conspiracy count. Cf. *United States* v. *Massiah*,

[4] Petitioners' suggestion that there was no proof that they received or concealed the heroin (Pet. 15) is also without substance. The jury was warranted in finding, for example, that the heroin involved in Count Four, which the evidence showed Gunersinda Luna procured from the premises next door, was received by her from someone at that address. And the fact that petitioners did not attempt to conceal the heroin from Agent Rivera, whom they took to be an accomplice, did not negate the inference, compelled by the evidence as a whole, that they sought to conceal it from enforcement officers.

307 F. 2d 62, 70–71 (C.A. 2), reversed on other grounds, 377 U.S. 201; *United States* v. *Agueci*, 310 F. 2d 817, 825 (C.A. 2), certiorari denied, 372 U.S. 959. To be sure the court, in its instructions dealing with the conspiracy count, did not specifically mention this element (Tr. 469–471; Pet. 16–17). But, in its instructions relating to Counts One and Four (the substantive counts based on Section 174), the court did explain the necessity of proof of such knowledge, and advised the jury, in accordance with the authorization contained in Section 174 (cf. *Turner* v. *United States*, 396 U.S. 398), that it could infer such knowledge from possession of the heroin if possession was not explained to the jury's satisfaction (Tr. 465–466; Pet. 14). The jury, in convicting on those substantive counts, necessarily drew the permitted inference and found that petitioners had the requisite knowledge. Hence, the failure of the court to repeat the same instruction in charging the jury on the conspiracy count was, even if erroneous, harmless error in the context of this case. *United States* v. *Baratta*, 397 F. 2d 215, 225–226 (C.A. 2), certiorari denied, 393 U.S. 939; *United States* v. *Chow*, 398 F. 2d 596, 597 (C.A. 2).

Moreover, since petitioners' sentences on the conspiracy count are to run concurrently with their longer sentences on substantive Counts One through Four, the concurrent sentence rule is applicable here. Consequently, the present contention is one that this court can appropriately decline to consider as a matter of "judicial convenience."

3. The court, after charging the jury that it should not give greater weight or credibility to the testimony of a witness because he was a government agent and should evaluate the agents' testimony as it would that of any other witness, added (Tr. 473–474):

> Of course, the government witness has an interest in establishing the truth of what they [*sic*] have told to the Grand Jury and to the jury. You are to determine whether that interest is sufficient so that they might fabricate an entire case, as these defendants assert here. The defendants have an interest, even if they are not guilty of the offense, of trying to show that they are not guilty and you can consider the interest of witnesses on both sides as to which set of facts you are going to believe.

Petitioners contend that the quoted charge unfairly placed the government witnesses "on the same pedestal with Truth," while suggesting that petitioners had a less disinterested motive in testifying (Pet. 23–26). As in the case of the instructions previously considered, however, the criticized charge was not objected to at the trial, and the claim of error, consequently, comes too late. In any event this instruction did not have the effect that petitioners seek to ascribe to it. When read in the context of the court's introductory instruction—to the effect that a government agent's testimony should not be given greater credit than that of any other witness merely because of his official status—the criticized instruction reflected an effort by the court to be as impartial as circumstances permitted. What the court quite clearly meant by the

first part of the instruction was that the government agents were not necessarily telling the truth and that they might possibly be fabricating an entire case against petitioners (as petitioners maintained) in order to shore up earlier false testimony given by them.[5]

4. The statute on which Count Five was based, 18 U.S.C. (Supp. V) 924(c)(2), provides for the punishment of "[w]hoever * * * carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." The

[5] Mrs. Helen Smaldone, a defense witness who lived on the top floor of the premises where petitioners resided and had known petitioners for three years (Tr. 295–296, 303), gave testimony substantially corroborative of Gunersinda Luna's testimony that immediately prior to the arrests two men, with one of whom she had been talking, pushed her into the apartment (Tr. 298–300; *supra*, n. 3). At the close of the instructions, defense counsel requested the court to instruct the jury "as a matter of law" that Mrs. Smaldone was "to be considered a disinterested witness." The court said it might have given such a charge if counsel had requested it prior to the instructions, but that it was not going to call the jury's attention to the point at that time (Tr. 481). Contrary to petitioners' contention that this ruling was reversible error (Pet. 25–26), the refusal was a proper exercise of discretion. As the court noted in the colloquy (Tr. 481), the jury had been told that it could consider a witness' interest in evaluating his or her testimony and counsel had argued in his summation that Mrs. Smaldone had no interest (Tr. 430–432, 472). The court properly concluded in these circumstances that to recall the jury specially to give the requested instruction would have given the matter unwarranted emphasis. Moreover, it is questionable whether, in light of Mrs. Smaldone's three-year acquaintance with petitioners and occupancy of the same apartment house, petitioners were entitled to a special instruction to the jury that she was a disinterested witness.

government proved through the testimony of three agents that Augustine Luna was carrying a revolver at the time of the November 7 narcotics offense (a felony), but it did not show that his carrying of the firearm was unlawful *per se* under state or local law. Augustine, testifying in his own behalf, denied having ever seen or possessed the questioned revolver (Tr. 355).[6] The trial court instructed the jury that to convict on this count it was required to find that Augustine Luna was carrying the firearm "not pursuant to any permit or license" (Tr. 468–469). Luna contends that the evidence on this count was insufficient as a matter of law and that he was, therefore, entitled to acquittal (Pet. 20–23).

Concededly, as the government acknowledged in the court of appeals, the government's proof on Count Five was deficient at the close of its direct case. No evidence having been adduced that Luna lacked a license for the revolver,[7] there was at that time no basis for a finding that his carrying of it had been unlawful. But, when Augustine Luna thereafter took the stand and denied possessing the firearm—a denial which was in direct conflict with the testimony of the government agents—he himself furnished a basis for a finding that his possession of the gun had

[6] Mrs. Luna similarly denied that her husband had possessed the firearm (Tr. 330).

[7] That the unlicensed carrying of a revolver in New York was unlawful was properly the subject of judicial notice. See N.Y. Penal Law, §§ 265.00(3), 265.05(3), 265.20(a)(3), 400.00.

been unlawful and warranted the court's submission of the issue to the jury.[8] The jury could properly conclude from the conflicting testimony concerning possession of the revolver that Augustine Luna had no license for the gun; a reasonable inference could be drawn by the jury that there was no other reason for his denial of possession. Otherwise, why did he not produce the permit and thereby completely exonerate himself of this charge? The jury properly drew from Augustine Luna's false denial of possession the inference that his carrying of the gun had been, as the court charged it was required to be, "not pursuant to any permit or license."

[8] At the close of the government's case-in-chief, defense counsel had unsuccessfully moved for a judgment of acquittal on all counts, but without focusing on Count Five or otherwise adverting to the present issue (Tr. 291–292). Counsel renewed the motion at the close of all the evidence, again without allusion to the issue, and that motion too was denied (Tr. 394). The government relied below—and we rely here—on the rule that where a defendant introduces evidence, he waives his objections to the denial of a prior motion to acquit, and that a reviewing court will in those circumstances determine the sufficiency of the proof on the basis of the entire record, including the defense's evidence. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 n. 1; *United States* v. *Feldman*, 425 F. 2d 688, 692 (C.A. 3); *United States* v. *Rawls*, 421 F. 2d 1285, 1286 (C.A. 5); *Viramontes-Medina* v. *United States*, 411 F. 2d 981, 982 (C.A. 9); *United States* v. *Gordon*, 410 F. 2d 1121, 1122 (C.A. 5), certiorari dismissed, 396 U.S. 938; *United States* v. *Dolleris*, 408 F. 2d 918, 922–923 (C.A. 6), certiorari denied, 395 U.S. 943; *Thompson* v. *United States*, 403 F. 2d 209, 210–211 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1971.

CERTIORARI
DENIED
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